IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO.1772 OF 1998

The Maharashtra State Co-op.
Bank Ltd. ...Petitioner

Versus

The State of Maharashtra through
the Secretary, Co-operation, Textile
& Industries Department, Mantralaya
Extension, Mumbai-400 032. ...Respondent

Mr. R.G. Ketkar, for the Petitioner
Mrs.S.S. Bhende, A.G.P. for Respodnent

CORAM : F.I. REBELLO & S.P. KUKDAY,JJ.
DATED : 1st February, 2005

ORAL JUDGMENT:(PER F.I. REBELLO, J.)

. It is the case of the petitioners that they have stood as guarantor for the loan advanced to Swami Vivekanand Kaku Tel Sahakari Karkhana Limited Kardha, Dist. Bhandara. The Respondent gave guarantee dated 5th June, 1982. In terms of the said guarantee the Respondent No.1 held themselves liable in case of default by the society to repay the amount of Rs.53.75 lakhs being due and payable as on 31st March, 1994 and interest thereon at the rate of 12.75% per annum with some other incidental charges. Clause 6 of the said guarantee read as follows:-

"The Guarantee contained in this Deed is a

continuing one for all amounts advanced or to be hereafter advanced by the Bank to the Borrower Society under the said long term loan accommodation as also for all interest costs Bank Commission, Bank Charges and other moneys which may from time to time became due and remain unpaid to the bank thereunder and shall remain in force until all such moneys shall be paid off in full with interest and all other charges."

2. It is the case of the petitioners that the society remained in arrears and ultimately a Liquidator was appointed on or about 24th April, 1997. As they have secured assets the petitioner sought permission from the Competent Authority to grant leave under Section 107 of the M.C.S. Act. As the leave was not granted the petition came to be filed. This Court in Writ Petition NO.392 of 1993 which was disposed of on 12th February, 1993 directed the authority to decide the application. As leave was refused by letter of 15th April, 1993 the petitioners filed Writ Petition NO.3657 of 1993. The petition was allowed by order dated 15th September, 1993. The order of the Director of Marketing dated 14th April, 1993 was set aside and permission was granted under Section 107 of the Act. Subsequent thereto the petitioners were

allowed to take possession of the Karkhana's assets as secured creditors. Auctions were held and ultimately the entire property was disposed of for Rs.33.22 lakhs on 1st January, 1996.

3. The petitioner thereafter addressed several letters to the respondent invoking the bank guarantee. Various letters followed. Inspite of that the respondents failed to pay the amount and consequently the present writ petition.

4. On behalf of the Respondent State an affidavit came to be filed on 31st October, 1998. The Respondents have basically raised three contentions. It is firstly contended that the claim is barred by limitation. Apart from that the petitioners had alternative and efficacious remedy of filing a suit. They cannot be permitted to overcome the bar of limitation by filing the present petition and on that count alone the petition ought to be dismissed. It is next contended that the claim is purely a money claim. No public interest is involved and, therefore, the petition under Article 226 would not be maintainable. It is lastly contended that interest as charged is not proper and not admissible. For all the aforesaid reasons it is submitted that the petition as filed be dismissed.

5. We may first deal with the issue of limitation as is sought to be raised on behalf of the petitioners. We have earlier reproduced Clause 6 of the guarantee dated 5th June, 1982. It would be clear from the clause as reproduced that the guarantee is a continuing guarantee and would remain in force until all moneys are paid off in full with interest. In other words until and unless the amount secured by the guarantee along with interest is paid the guarantee would subsist. The petition was filed in the year 1998. The amounts as claimed by the petitioners from the respondents were not paid and in these circumstances it would be clear that as the debt subsists clause 6 would be operative and could be invoked by the respondents. Plea of limitation, therefore, has to be rejected.

6. We then come to the second contention as to whether this Court ought not to exercise its extra ordinary jurisdiction on the ground that the petition raises a dispute based on breach of the contract of guarantee and further that the petitioners have a remedy by way of a suit. Rule was issued on 4th May, 2001. We will first consider whether the petition as filed invoking the extra ordinary jurisdiction would be maintainable. The learned Counsel for the petitioner in support of his contention that the

petition is maintainable has placed reliance on the judgment of the Apex Court in the case of **ABL International Ltd. & Anr. vs. Export Credit Guarantee Corporation of India Ltd. & Anr., (2004) 3 SCC 553.** In that case a contract was entered into by one Raassik Woodworth Limited with M/s.RVO Kazpishepromsyrion to be known hereafter as Kazak Corporation. The agreement provided that the payment was to be guaranteed by the Government of Kazakhstan. After the contract was entered into one of the parties Appellants before the Aepx Corut approached Export Credit Guarantee Corporation of India to ensure the risk of payment. A comprehensive risk policy was issued on 30th September, 1993 effective from 23rd September, 1993 to 30th September, 1995. The Kazakhstan Government also give an irrevocable guarantee. The Appellant's case was that the payment of consideration by barter of goods could not be finalised between the appellant and the Kazak Corporation. The Kazakghstan Government though admitted its liability to pay the balance of consideration did not fulfil its part of the guarantee in the contract due to lack of funds. On failure by the Kazak Corporation to make payment, made a claim on the 1st respondent for the reasons set out. A petition came to be filed before the Calcutta High Court by the Appellant therein which included relief amongst others for

payment of the dues to it under the contract of insurance. The learned Single Judge held that Writ Petition was maintainable and allowed the petition. An appeal was preferred wherein the judgment of the learned Single Judge was set aside. This was taken by way of Special Leave to the Apex Court. The Apex Court firstly addressed itself to the issue whether Writ Petition under Article 226 was maintainable to enforce a contractual obligation of the State or its instrumentality by an aggrieved party. Relying on its earlier Judgment the Apex Court observed as under:-

> "It is clear from the above observations of this Court in the said case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the Court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief.

The Apex Court then observed as under:-

> "It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party to

the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ Court can issue suitable directions to set right the arbitrary actions of the first respondent.

. From the above observations it would be clear, therefore, that a writ petition would be maintainable and the following legal principles emerge as set out by the Apex Court in para.27 of the Judgement. They may be enumerated as under:-

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

. The Apex Court then in paragraph 22 observed as under:-

"However, while entertaining an obligation as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks). And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and

> unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

It would thus be clear that a petition is maintainable even in the contractual field and breach thereof.

7. With the above we may now consider the facts of the present case. There is no dispute that it is the respondent who had given guarantee for securing of the loan amount paid to the Karkhana. The respondents have failed to make payment in terms of the guarantee. The Respondent no doubt is a State within the meaning of article 12 of the Constitution of India. The only challenge raised was the plea of maintainability of the petition, which has been rejected. The remedy of a suit will not be an alternate and adequate remedy considering observations of the Apex Court in ABL International Ltd. (supra) that even in matters of contract when the State or its instrumentality acts contrary to public interest, unfairly, unjustly and unreasonably violating the constitutional or statutory obligations a Writ Petition is maintainable as it really acts contrary to the Constitutional mandate of Article

14 of the Constitution. In the instant case the respondent had made a solemn assurance to the petitioners that on advancing the loan to the Karkhana that would be secured by the Respondents and payment made to the petitioner in terms of the guarantee. The respondents are seeking to repudiate that guarantee not on a reasonable ground, but on technicalities which we have rejected. The petition does not also involve any disputed question of fact. The issues which arise are only the matter of enforcement of the bank guarantee. The Respondent who has held out to the petitioner that it would secure it, if it advanced loan to the Karkhana, cannot now back out or withdraw from the said guarantee as the petitioners by advancing loan have acted to their prejudice. It is, therefore, clear that the Writ Petition would be maintainable both on the grounds that the petitioner can invoke the doctrine of promissory estoppel though it is not pleaded in the petition, but also on the ground that the State Government cannot arbitrarily act even in the field of contract and more so in the case where it had given a solemn assurance to secure the loan advanced by the petitioner to the Karkhana. Writ petition, therefore, will be maintainable in the instant case.

8. Having said so the real issue is of the

liability. In our opinion considering the facts which have come on record and also the amount received by the petitioners on 3rd January, 1996 from the sale of the assets of the Karkhana in the sum of Rs.31,86,844.05 paise in our opinion the liability of the respondent would be as under:-

(i) As on 31st March, 1994 Rs.53,75,000/-.

(ii) This amount will carry simple interest at 12.75% per annum without being compounded, till final payment.

(iii) The amount would be adjusted on 3rd January, 1996 to give credit to the respondent for the sum of Rs.31,86,844.065 which has been received by the petitioner from sale of assets of the Karkhana. This amount will firstly be adjusted against the interest which has accrued as and upto 2nd January, 1996. The balance to be adjusted against the principal amount. The balance principal amount then to be calculated on 3rd January, 1996. That would carry further simple interest at 12.75% per annum from 3rd January, 1996 till payment, without capitalisation.

. Rule made absolute accordingly. There shall be no order as to costs.

(F.I. REBELLO, J.)

(S.P. KUKDAY, J.)